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In the Supreme Court of the United States

October Term, 1976
No. 477

MARY F. McNAMARA and ANARITA McNAMARA,
Petitioners

versus

TCS-1, et al.,
Respondents

On Petition for Writ of Certiorari to the Supreme Court of Pennsylvania.

BRIEF FOR RESPONDENT, TCS-1, IN OPPOSITION

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Question Presented

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QUESTION PRESENTED

Petitioners set forth no question assertedly presented by the petition. The reasons asserted by Petitioners for granting the writ in fact indicate the question is as follows: "Does a misapplication of state law by a state court constitute a denial of equal protection of the laws under the Fourteenth Amendment?"

STATEMENT OF THE CASE

The Respondents herein are Redevelopment Authority of the City of Scranton (Redevelopment Authority) and TCS-1; the latter a Pennsylvania nonprofit corporation chartered to sponsor, develop and provide housing units under the provisions of the National Housing Act.

The instant petition arises out of an eminent domain proceeding commenced on March 1, 1969, when the Redevelopment Authority filed a declaration of taking for Petitioners' premises located in the City of Scranton, Pennsylvania. Thereafter, on November 12, 1969, the Redevelopment Authority contracted to sell and convey said premises to TCS-1.

The condemnation action has had a lengthy history. Preliminary objections of the Petitioners herein to the declaration of taking were dismissed by the Court of Common Pleas of Lackawanna County, Pennsylvania. An appeal to the Commonwealth Court of Pennsylvania was dismissed. Reconsideration was denied by the Commonwealth Court and a petition for allocatur was denied by the Supreme Court of Pennsylvania.

Petitioners herein then sought an injunction from the United States District Court for the Middle District of Pennsylvania which denied same in June, 1972. An appeal to the United States Court of Appeals for the Third Circuit was dismissed for failure to perfect the appeal.

Thereafter, TCS-1 brought an action against the Redevelopment Authority in the Court of Common Pleas of

Lackawanna County, Pennsylvania, for specific performance of the November 12, 1969, contract to convey the subject premises to TCS-1. This proceeding resulted in a final decree of September 16, 1974, whereby the Redevelopment Authority was ordered to demolish and remove to grade all existing buildings and structures on the subject premises and to execute and deliver a deed to TCS-1 conveying a clear and marketable title to the premises.

In order to comply with the aforesaid mandate, the Redevelopment Authority sought possession of the premises and filed a praecipe for a rule of possession upon which the Court of Common Pleas of Lackawanna County directed Petitioners herein to show cause why they should not deliver up possession of the premises to the Redevelopment Authority. Petitioners herein filed preliminary objections (A. 4a-6a)[1] which were dismissed by the lower court "for lack of merit on their face" (A. 8a)[2] and such action was affirmed per curiam by the Commonwealth Court of Pennsylvania (A. 9a). Petitioners' petition to the Supreme Court of Pennsylvania for allowance of appeal from the Commonwealth Court was denied (A. 9b) as was petitioners' petition to the Supreme Court for reconsideration of the denial of allowance of appeal from the Commonwealth Court to the Supreme Court (A. 1a).

The net effect of the proceedings in the Pennsylvania appellate courts is that the respondent herein, Redevelop-

[1] References to Petitioners' appendix.

[2] On the same day the court made the rule to show cause absolute and awarded judgment of possession to the Redevelopment Authority.

ment Authority, has a final judgment awarding possession of the subject premises to it and that it is now in position to comply with the order of the Court of Common Pleas of Lackawanna County directing it to convey title and possession to respondent herein, TCS-1.[3]

[3] TCS-1 became a party to these proceedings when granted leave to appear as an intervening appellee in the Commonwealth Court of Pennsylvania. The respondent herein, Redevelopment Authority, has not executed on its judgment of possession pending the appellate proceedings in Pennsylvania and the instant petition.

ARGUMENT

Petitioners' position is ambiguous at best. On the one hand they argue that since their preliminary objections to the Redevelopment Authority's petition for writ of possession were endorsed with a notice to plead, under Pennsylvania law the averments in the preliminary objections were admitted in the absence of a responsive answer from the Redevelopment Authority. On the other hand, they contend that a disputed issue of fact in preliminary objections requires the taking of evidence by deposition or otherwise.

From these somewhat inconsistent premises petitioners conclude that when the trial court precluded testimony or deposition and dismissed the preliminary objections because of "lack of merit on their face," Petitioners were denied the equal protection of the laws under the Fourteenth Amendment.

Petitioners' argument comes down to a contention that the Pennsylvania courts from the trial to the appellate level erred in their application of Pennsylvania law. However, "no denial of equal protection is demonstrated unless there is shown intentional or purposeful discrimination between persons or classes." *Stanturf v. Sipes,* 335 F.2d 224, 228 (8th Cir. 1964), *cert. denied,* 379 U.S. 997, 85 S.Ct. 676 (1965). *Beck v. Washington,* 369 U.S. 541, 554-555, 82 S.Ct. 955, 962-963 (1962), pointed out:

> "Such misapplication [of state law] cannot be shown to be an invidious discrimination. We have

said time and again that the Fourteenth Amendment does not 'assure uniformity of judicial decisions * * * [or] immunity from judicial error * * * '. Milwaukee Electric Ry. & Light Co. v. Wisconsin ex rel. Milwaukee, 252 U.S. 100, 106, 40 S.Ct. 306, 309, 64 L.Ed. 476 (1920). Were it otherwise, every alleged misapplication of state law would constitute a federal constitutional question."

Delia v. Court of Common Pleas of Cuyahoga County, 418 F. 2d 205, 206 (6th Cir. 1969), *cert. denied,* 396 U.S. 886, 90 S.Ct. 174 (1969), presented a situation somewhat analagous to the instant petition. Suit was brought on an account in an Ohio court and resulted in a money judgment which was affirmed on appeal. The defendant in the state court action then filed suit in the federal district court seeking a declaratory judgment to set aside the state court judgment on the grounds that the Ohio trial court failed to require of the plaintiff in the Ohio action proof of the elements of the plaintiff's cause of action, thereby denying to the defendant in the state suit "the equal protection of the laws." The court of appeals noted that unequal application of a state law is not a denial of equal protection unless there is shown to be present an element of intentional or purposeful discrimination and concluded:

"If it should be assumed that the Ohio courts did not correctly apply the law of Ohio to appellant's case, there is nevertheless a lack of any allegations in the complaint tending to show a purposeful discrimination. Certainly, a construction of the equal protection clause is not favored which would in effect

allow a federal court to relitigate a state court case upon every alleged departure from state law by state officers."

Similarly, *Combs v. State of Tennessee,* 530 F. 2d 695, 698 (6th Cir. 1976), *cert. denied,* 96 S.Ct. 1731 (1976), held: "Misapplication of State law, absent invidious discrimination, does not necessarily prevent a federal constitutional question."

It is submitted that even if the Pennsylvania Supreme Court erred in its application of state law, such action was not a denial of Petitioners' right of equal protection of the laws. The petition for certiorari should be denied.

Aside from the foregoing constitutional basis, it is to be noted there was no misapplication of law by the Pennsylvania courts. Petitioners' preliminary objections in the Pennsylvania trial court were twofold: a motion to strike off the petition for writ of possession on the grounds that the Redevelopment Authority had no legal right to sue for possession of Petitioners' premises until it had conformed to the mandate of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Pub. L. 91-646, Jan. 2, 1971, 84 Stat. 1894, 42 U.S.C.A. §§4601-4655 (Act), and a contention that the Redevelopment Authority was estopped to acquire possession (A. 4a-5a). They will be considered seriatim.

Initially it is to be noted that only facts which are properly pleaded are admitted by a failure to answer. 2A *Anderson, Pennsylvania Civil Practice,* §1029.11 at pp. 563-564, states:

"A party is not required to answer facts which are not well pleaded. Accordingly, there was no

necessity of filing an answer to a preliminary objection in the nature of a demurrer when the demurrer improperly avers facts and is a speaking demurrer.

No answer is required to conclusions of law, and they are not admitted by failing to deny them in a responsive pleading. Hence the failure to plead to averments in a preliminary objection endorsed with a notice to plead is not an admission where such admissions are not averments of fact but merely conclusions of law . . .".

Petitioners' motion to strike off the praecipe for the writ of possession did not allege any relevant or material facts demonstrating that the Redevelopment Authority failed in any manner to comply with the Act. It is not surprising that the trial court viewed the bald allegations of Petitioners' preliminary objections to be patently insufficient on their face.

Further, the Act is in three parts: Subchapter I contains general provisions (42 U.S.C.A. §§4601, 4602); Subchapter II governs relocation assistance to be rendered to displaced persons (42 U.S.C.A. §§4621-4638); Subchapter III governs real property acquisition to implement federally assisted programs (42 U.S.C.A. §§4651-4655). See *Rubin v. Department of Housing and Urban Development,* 347 F. Supp. 555, 557 (D.C. Pa. 1972).

A "displaced person" is defined in the Act as being "any person who . . . moves from real property . . . as the result of the written order of the acquiring agency to vacate real property . . ." 42 U.S.C.A. §4601 (6). Since Petitioners are still in possession of the subject property, they are not entitled to any relief under Subchapter II as a displaced person. *Will-Tex Plastics Manufacturing,*

Inc. v. Department of Housing and Urban Development, 346 F. Supp. 654, 657 (D.C. Pa. 1972). In any event, petitioners herein made no allegation in their preliminary objections that the Redevelopment Authority failed to comply with any provisions of Subchapter II of the regulations thereunder. *Will-Tex Plastics,* supra. Finally, the Act and the regulations thereunder "provide administrative remedies for persons aggrieved by actions within the purview of the Act," *Smith v. City of Cookeville,* 381 F. Supp. 100, 106 (D.C. Tenn. 1974), and the Petitioners made no allegation in their preliminary objections that they had taken recourse to, let alone exhausted, the administrative remedies.

Subchapter III is applicable only to real property acquired after January 2, 1971. *Rubin v. Department of Housing and Urban Development,* 347 F. Supp. 555, 557-558 (D.C. Pa. 1972); *Will-Tex Plastics Manufacturing, Inc. v. Department of Housing and Urban Development,* 346 F. Supp. 654, 657-659 (D.C. Pa. 1972). The subject property was acquired by the Redevelopment Authority by condemnation upon the filing of the declaration of taking on March 1, 1969. Thus Subchapter III was not applicable.

Therefore, not only did Petitioners in their preliminary objections fail to allege any facts showing in what manner the Redevelopment Authority failed to comply with the provisions of the Act but also Petitioners could not claim any relief under Subchapter II of the Act as they are not a "displaced person" and they cannot make any claim under Subchapter III as Petitioners' property was acquired on March 1, 1969, which was prior to the effective date of the Act.

The alleged estoppel of the Redevelopment Authority to acquire possession of Petitioners' premises was based upon four grounds:

(a) The Chairman of the Board of the Redevelopment Authority allegedly stated that the Authority did not choose to take title to Petitioners' property. Two short answers are in order: first, the chairman alone could not bind the Authority and second, Sec. 408 of the Pennsylvania Eminent Domain Code, Act of June 22, 1964, P.L. 84, Art. IV, §408, as amended 26 P.S. §1-408, provides a procedure for the revocation of condemnation proceedings. Suffice to say that the Redevelopment Authority did not resort to such procedure. In truth, the Redevelopment Authority could not very well relinquish the subject property because it is under the guns of the lower court's mandatory injunction to sell and convey Petitioners' property to the respondent herein, TCS-1.

(b) As for the status of TCS-1, suffice to note that the lower court, in the action for specific performance of the contract between the Redevelopment Authority and TCS-1, had already found as a fact that TCS-1 had corporate status when the Redevelopment Authority was ordered to perform its contract with it. Understandably, the trial court was not detained with this objection.

(c) The negotiations between Petitioners and the Redevelopment Authority were patently insufficient to create an estoppel.

(d) The preliminary objections obliquely raised the constitutionality of the Pennsylvania Eminent Domain Code. However, that issue was not even alluded to in Petitioners' brief in the Commonwealth Court of Pennsylvania.

In light of the foregoing, it is quite apparent why the trial court considered the Petitioners' preliminary objections, with immaterial and irrelevant allegations, were devoid of merit on their face.

The trial court of Lackawanna County, Pennsylvania, was no stranger to this matter. After almost six years of litigation, that court saw through the tenuous allegations of estoppel and readily perceived the veiled reference to the Act was a poor substitute for specific averments of how, when and where the Redevelopment Authority had failed to comply with the statute. Understandably, the trial court dismissed the preliminary objections out of hand.

CONCLUSION

It is respectfully submitted that Petitioners have wholly failed to sustain their burden of establishing under Rule 19 that there are special and important reasons why the writ should be granted. Even if the Pennsylvania Supreme Court misapplied state law, such misapplication does not constitute an invidious discrimination so as to deny Petitioners the equal protection of the laws. In point of fact, moreover, the Pennsylvania courts did not misapply state law. The petition should be denied.

Respectfully submitted,

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